UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BUILDING SERVICE 32BJ
LEGAL SERVICES FUND [1]

Employer

and **Case No. 2-RC-22728**

NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS, (NOLSW), U.A.W., LOCAL 2320, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Lana Pfeifer, a Hearing Officer of the National Labor Relations Board, herein called the Board. The sole issue raised by the parties at the hearing concerned whether the Employer's "supervising attorneys" were supervisors within the meaning of the Act. As set forth below, I have concluded that the supervising attorneys possess the requisite authority set forth in Section 2(11) of the Act, and must be excluded from the petitioned-for unit on that basis.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.[2]

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[1] The name of the Employer appears as amended at the hearing.
[2] The Hearing Officer correctly rejected, and placed in the rejected exhibit file, the Employer's proffer of job analysis questionnaires purportedly containing statements of the supervising attorneys describing their job functions. These exhibits were properly rejected as they could not

2. The parties stipulated that Building Service 32BJ Legal Services Fund, the Employer, is a jointly administered benefit plan, having its principal place of business located at 101 Avenue of the Americas, New York, New York. The Employer provides legal assistance benefits to qualified individuals for whom contributions are made by their employers pursuant to collective bargaining agreements between those employers and the Service Employees International Union, Local 32BJ, AFL-CIO. During the past calendar year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $250,000, and purchased goods and materials valued in excess of $5,000 directly from entities located outside the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the National Organization of Legal Services Workers, (NOLSW), U.A.W. Local 2320, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Petitioner filed a petition seeking an election in a unit comprised of paralegals, attorneys and supervising attorneys employed by the Employer. The Employer contends that the petitioned-for appropriate unit should not include the

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be authenticated. The Hearing Officer additionally refused to allow testimony regarding the contents of these exhibits. I also affirm that ruling. I have considered the Employer's offer of proof and find that the testimony proffered, even if allowed, is not of sufficient probative value to warrant a reversal of that ruling. In this regard I note that the Employer has offered no case citation to support its contention that the subjective perceptions of an individual as to whether he or she is a "supervisor" is relevant to a determination of whether an individual meets that test under the Act.

supervising attorneys who it maintains are supervisors within the meaning of Section 2(11) of the Act. The Petitioner maintains that the job responsibilities of the supervising attorneys are not sufficient to confer supervisory status.[3] The record, as discussed below, is based upon testimony provided by Bruce Bentley, the Employer's Director, testifying on behalf of the Employer, and Supervising Attorney Harriet Holtzman, testifying on behalf of the Petitioner, as well as a number of documentary exhibits introduced into evidence by the Employer.

Overview of the Employer's Operations

The Employer is a Taft-Hartley benefit fund which provides legal services to members of Local 32BJ, SEIU, AFL-CIO, (Local 32BJ) and their eligible dependents, in six areas of law: Immigration, Civil Litigation, Criminal, Family, Matrimonial and Property Law. The Employer is overseen by a Board of Trustees, which is comprised of an equal number of representatives from signatory employers and Local 32BJ, and oversees the operations of all the fringe benefit funds involving members of Local 32BJ. Reporting to this Board is Chief Executive Officer Mary Ellen Boyd who, similarly, oversees the operation of all the fringe benefit funds. The Employer is headed by Director Bruce Bentley. Reporting to him is Deputy Director Alan Snyder. Next are the six supervising attorneys of the various legal departments.[4] Under each supervising attorney is a staff ranging from two to seven attorneys.[5] Certain departments also employ paralegals.[6]

[3] At the hearing, the Petitioner was asked whether it would be willing to proceed to an election in the event a unit other than the one petitioned-for was found appropriate herein. The record reflects that the Petitioner raised questions regarding the potential impact that such a concession would have on its right to request review of my determination. Under these circumstances, it is not clear whether Petitioner's statement regarding its willingness to proceed to an election in another unit was responsive to the question posed by the Hearing Officer. Therefore, I am directing the Petitioner to notify me, in writing, within seven days of the date of this Decision, whether it wishes to proceed to an election in the unit found appropriate herein.

[4] These are: Leslie A. Brody, Criminal; Mark Grayson, Property; Isodore Hass, Civil Litigation; Harriet Holtzman, Matrimonial; David Projansky, Family; and Melissa Werger, Immigration.

[5] There are 30 staff attorneys in total.

[6] The immigration department has three paralegals, and the Family Law and Matrimonial departments each have one paralegal.

Each department also employs between one and three legal secretaries. The Employer's support staff is represented by the Communications Workers of America, Local 1177.

In general, and as discussed in further detail below, Bentley testified that the supervising attorneys are generally responsible for "workflow procedures" including scheduling and assigning intake appointments, reviewing cases, training employees in the law and case-handling procedures, arranging coverage for vacation periods, assigning legal secretaries to work with particular attorneys, and reviewing the volume and quality of the work produced in their department. The record establishes that professional employee turnover is infrequent and that most of the staff has significant tenure. Supervising attorneys also handle cases, and assign to themselves those cases that they will process. In every case, Bentley is the attorney of record. The staff or supervising attorney assigned to the matter appears on court papers as "of counsel." There are about 4000 open cases currently being processed by the Employer's staff.

Case Processing Procedures

The Employer has its offices in the Local 32BJ headquarters located at 101 Sixth Avenue, New York, New York, where it occupies the 16th and 17th floors. The Employer maintains a screening department, supervised by Deputy Director Snyder, where screeners take telephone calls from and meet with walk-in potential clients. A screener is responsible for determining whether the person is eligible to receive legal benefits. Once that is determined, the screener establishes whether the matter is one covered under the Plan. Then, the screener ascertains the geographic location to determine whether the matter should be handled in-house or referred out to a cooperating attorney.[7] Once it is

[7] The Employer generally handles those matters arising within the four major boroughs of New York (Bronx, Manhattan, Queens and Brooklyn.) Cases arising elsewhere or those involving a conflict of interest are referred to a panel of attorneys who are engaged in private practice. These

determined that the matter is covered and that it will remain in-house, the screener schedules an appointment in the appropriate department for what is known as "intake." The intake is conducted by the attorney who will be assigned to the matter.

According to Director Bentley, the supervising attorneys determine the intake schedules for their respective departments. The precise methods by which such schedules are established varies from department to department and was not discussed in any particular detail. According to Bentley, factors entering into consideration include court dates and staff attorney calendars and availability. Supervising Attorney Harriet Holtzman testified that, in her department, (Matrimonial), each attorney is responsible for three intake slots per week. That particular system was devised at a meeting where various staff members expressed their preferences for the dates and times when they would be assigned to perform intake services. According to Holtzman, this process has remained in place for a number of years and is fairly routine. Generally, the supervising attorneys have the responsibility to ensure that intake is covered. In the event a staff attorney is absent or has a court appointment presenting a conflict, the staff attorney is expected to inform the supervising attorney, or if the supervising attorney is not available, another staff member, and arrange for coverage. From time to time, supervising attorneys have requested that intake be closed or limited for particular periods of time; for example, when an attorney is on vacation or the department is inundated by cases. The record reflects that the supervising attorneys do not have the discretion to make that decision independently, and that they will request authorization to take such action from Bentley. While he will generally accommodate such requests, the record additionally reflects that Bentley will, on occasion, ask the department in question to handle additional cases notwithstanding the supervising attorney's wishes. In addition,

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attorneys handle cases according to a fee schedule. The cooperating attorney program is overseen by Deputy Director Snyder.

Bentley required that the Matrimonial department change its prior practice of leaving cancelled intake appointments unfilled.

At the intake appointment the staff attorney meets with the client, takes notes of the interview. After this meeting the staff attorney prepares an opening case summary that is recorded in the file. The file is then processed administratively and forwarded to the supervising attorney for review. The supervising attorney reviews any court papers, reads the file notes and reviews the plan of action proposed by the attorney. The supervising attorney then stamps and initials the file to indicate that it has been reviewed. Depending on the status of the matter, the supervising attorney may make notes to the files. Such notes include directions to the staff attorney with regard to further processing of the matter.[8] The number of times a particular case is reviewed by a supervising attorney varies from matter to matter. Holtzman testified that she reviewed cases on a regular basis for matters such as timeliness and to make recommendations as to how to proceed. According to Bentley, staff attorneys are expected to follow the directives of the supervising attorneys. Holtzman generally conceded this to be the case, but added that cases frequently change in status and the staff attorney is responsible to alter his or her representation in accordance with such changed circumstances notwithstanding any direction a supervising attorney may place in the file. In addition to notations placed in the case file, supervising attorneys consult with staff attorneys in an ongoing informal basis regarding pending matters. Motions are circulated among staff members for review and comment.

[8] For example, the supervising attorney will instruct the staff attorney to "be sure seller has title before client signs [contract]," to "get order and close," to "please proofread letters before they're signed," and to "talk to the clients about this again." In one instance arising in the Matrimonial Law department, the staff attorney noted on the intake form that he left it up to the client to decide whether to proceed with a divorce. Upon review, Supervising Attorney Holtzman wrote that she believed that there was "no grounds" for divorce and that even if the client "wants to go forward, do not start an action."

A number of supervising attorneys have so-called “open door” policies whereby staff attorneys are welcomed to come by to discuss pending cases. In some instances, a staff attorney is granted discretion to take certain actions without prior consultation with the supervising attorney. For example, according to Holtzman, a staff attorney does not have to consult with a supervisory attorney prior to either settling a case or changing litigation strategy. The record reflects that supervising attorneys may, from time to time, reassign cases. Factors which might go into such a determination include the consolidation of court appearances, unavailability due to illness, or client dissatisfaction with a particular attorney. No specific instance where this has occurred was adduced in the record.

When a staff attorney determines that a matter has been concluded, he or she writes a closing summary. The file is then given to the supervising attorney, who is responsible for ensuring that all appropriate action has been taken. After reviewing the file, including log notes, correspondence and documents, if the supervising attorney has concluded the matter is appropriate for closure, he or she will initial the appropriate form and the file is given to support staff for final processing. Neither the Director nor the Deputy Director review such determinations. The supervising attorney may return the file to the staff attorney with questions or for further processing, if appropriate. A case may not be closed without the approval of the supervising attorney.

Hiring, Discipline and Related Matters

The record reflects that the supervising attorneys play a significant role in the hiring of staff attorneys and other employees in their respective departments. As noted above, the turnover rate of staff attorneys is very low. While the most recent hire occurred in 2002, it is not clear from the record when the last hire occurred prior to that time. When there is a staff attorney vacancy, the Director will place an advertisement in

the New York Law Journal. Once the applications are received, a routing form is attached and forwarded to the supervising attorney in the department where the vacancy exists. The supervising attorney then reviews the applications and determines which applicants have the necessary qualifications and relevant experience. The supervising attorney then forwards a recommendation to the Director as to whether the applicant should be granted an interview. According to Bentley, at this stage of the process those who the supervising attorney deems to be not qualified are given no further consideration, although he did also testify that he will "usually" take a look at the application himself. In the event the supervising attorney recommends an interview, this recommendation will be reviewed by the Director, and on occasion, by the Deputy Director. If there is agreement with the supervising attorney's recommendation, an initial interview with the applicant is scheduled. This interview is conducted by the supervising attorney. In the course of the interview the supervising attorney follows the outlines of a standard evaluation form, which, among other things, requires the rating of the applicant in a number of factors on a scale of from one to ten. The interview also consists of a number of hypothetical case situations devised by, and presented to the applicant by the supervising attorney, as well as a general discussion of the applicant's prior work history. Once the interview is complete, the supervising attorney completes the evaluation form and either does or does not recommend a second interview. The supervising attorney may also make more general comments as to whether he or she believes this candidate should or should not be hired. Bentley testified that he defers to the negative recommendations from supervising attorneys and does not conduct second interviews of such candidates, although he did acknowledge that he would review such recommendations. [9] In the event the supervising attorney recommends a second

[9] For example, Holtzman stated that a staff attorney should be hired inasmuch as she was a "perfect fit." She was later hired. Conversely, supervising attorney Melissa Werger recommended

interview, it is conducted by the Director. Such interviews may last up to one hour. Once all the applicants recommended by the supervising attorney are interviewed, a meeting is held among Bentley, the supervising attorney and the Deputy Director to decide whom to hire. In the event there is only one candidate for a position, Bentley may ask the supervising attorney to look further. Bentley testified that, in deciding who to hire, the committee operates largely upon consensus, but he also acknowledged that he had the ultimate decision-making authority in this regard. Once the committee agrees upon a candidate, the supervising attorney checks their references. If these are satisfactory, Bentley offers the position to the candidate, and determines their salary level.[10]

The procedure for hiring legal secretaries is different. When a position becomes available, the Human Resources department responsible for all Local 32BJ fringe benefit funds solicits applicants already employed in positions with the various funds. Applications which are submitted are then assessed by that department as to relevant experience and skills. In the event there are no qualified applicants, Human Resources will advertise for the position and conduct an assessment of those applicants. The resumes of those deemed to meet the criteria for the position are forwarded to Director Bentley, and are then given to the supervising attorney in whose department the vacancy exists. The supervising attorney reviews the resumes and advises Human Resources about which candidates they are interested in considering. Those candidates are then administered a series of tests to measure their various skill levels and the results of the tests are sent to the supervising attorney. The supervising attorney will

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that a particular candidate not be hired because of an inconsistent work history and her comment that she left prior jobs because of "office politics." This candidate was not hired. Similarly, on several occasions, candidates in the Criminal and Immigration Law departments were not hired after the supervising attorneys recommended that they not be given second interviews.

[10] As discussed below, attorneys are compensated in one of five salary grades based upon prior experience and years of admission to the Bar. On one occasion, Supervising Attorney Holtzman recommended that, due to her extensive experience a candidate be hired at the highest salary level, even though the Director had requested that candidates be sought who could be hired at lower levels of pay. Holtzman's request was granted.

then interview the candidate, frequently in conjunction with the staff attorney for whom the candidate will be working. If the candidate is found to be acceptable, the supervising attorney will notify Human Resources of that fact, and an offer will be made. The record is silent however, regarding whether any further review or assessment at this stage is conducted by Human Resources, and Holtzman testified that she does not have the authority to hire legal secretaries or paralegals.[11] The record does reflect, however, several occasions when a supervising attorney's recommendation that a particular candidate not be hired has been followed.[12] The Director and Deputy Director do not take an active role in the hiring of legal secretaries, but the Director hired the receptionist. There is evidence, however, that, in the past, supervising attorneys were asked to submit comments regarding candidates for that position, and that they have done so. In addition, three paralegal positions were created in the Immigration Law department in 2002. Supervising attorney Melissa Werger recommended a legal secretary from her department be promoted into that position, which she was.[13]

From time to time, attorneys may request a transfer into another department. The general procedure followed is for that attorney to contact the supervising attorney of the department into which they wish to be transferred. According to Bentley, if there is a vacancy, and the supervisory attorney concurs, the transfer is effectuated. Bentley testified to two instances, both occurring in the mid-1990's where such transfers were effectuated, and one, in the same general time frame, where it was not. In contrast, Holtzman testified that Mark Grayson, the supervising attorney in the Property Law department repeatedly complained at management meetings about the fact that two

[11] There is no evidence regarding the specific procedures used to hire paralegals.
[12] For example, Supervising Attorney Isadore Huss recommended both that one particular candidate not be hired and that a temporary employee not be retained on a permanent basis. Similarly supervising attorney Melissa Werger recommended that an individual not be given a position as a legal secretary in her department.
[13] By contrast, no action was taken regarding a supervising attorney's request that the salaries of paralegals be increased commensurate to their increased job responsibilities.

attorneys had been placed into his department over his objection. She further testified that transfers do not happen often and there are no formal procedures followed. On one occasion, an attorney requested a transfer into the Matrimonial department and Holtzman was happy to have her.

Bentley testified that the supervising attorneys have the authority to issue discipline to employees. Bentley testified, generally, that when necessary, the supervising attorney will speak to the employee, and may do so again, then will make some notes for the personnel file. The supervisory attorney may write a memo to the staff member with a copy going to Bentley. Thus, the supervisory attorney takes progressive steps to more serious action. Bentley further testified that, in general, the staff attorneys have tenure ranging from eight to ten years, and there is no need to exercise disciplinary authority; however, that does not mean that such authority has been taken away.

The record reflects that on rare occasions supervising attorneys have written memoranda documenting perceived inadequacies in the job performance of employees. For example, in 1995, Supervising attorney Holtzman approached Bentley about a problem she was having with a particular staff attorney. She was instructed by Bentley to prepare a memorandum and give it to that employee. A copy of this memorandum was retained in the employee's personnel file. According to Holtzman, no action was taken against that employee as a result of this memo; however, he did resign shortly thereafter. In addition, Holtzman prepared a memorandum about difficulties in the job performance of a legal secretary. In this instance, she was again instructed by Bentley to prepare a memorandum and, as before, the memo did not result in discipline being issued to this employee. Bentley testified that if a supervising attorney prepared such a memorandum which he disagreed with, or felt would cause problems for the Employer, he would direct the supervising attorney to change it. The record reflects that, to date,

no staff attorney has been terminated for cause. Moreover, other than the incidents described above, the record does not contain any evidence regarding memoranda or other disciplinary action taken by supervising attorneys with respect to other employees.

In the past, supervising attorneys were required to prepare annual evaluations of staff attorneys. That practice was discontinued a number of years ago after the supervising attorneys complained that the process was largely repetitive and not a useful exercise. There is no evidence that these evaluations were used to reward employees or, conversely, that they led to adverse employment consequences.

Supervising Attorneys' Authority to Approve Employee Actions

Staff attorneys, paralegals and legal secretaries are eligible for a certain amount of sick and vacation leave per year. To request leave, the employee submits a request indicating when they plan to be out and the type of leave they wish to take. This leave request is initially directed to the supervising attorney, who exercises discretion in ensuring that coverage in the department is sufficient so that the particular employee can be spared for the time requested. Once the supervising attorney has done that, he or she signs off on the leave request and it is forwarded to Bentley. His secretary conducts a review of whether the employee has accrued sufficient time to meet the request. Once that is done, Bentley approves the request. Although, Bentley testified that any employee denied leave could approach him directly, he also stated that he has never gone against a supervisory attorney's recommendation in this regard. There is no evidence in the record of any particular occasion when an employee's vacation request has been denied by his or her supervising attorney.

The record additionally reflects that from time to time support staff, who are hourly employees, either request or are asked to work overtime. There is no evidence that supervising attorneys have the authority to require employees to work overtime. A

typical overtime assignment may be one hour, or some fraction thereof, per week. On such occasions, a form stating the date, hour and reason, is completed, and authorized by the supervising attorney. These forms are submitted on a weekly basis. Bentley testified that the supervising attorney does not have to check with him or anyone else prior to authorizing such overtime work, although they might do so if weekend work was required because of the necessity of getting clearance to enter the building. When Bentley receives this form, it may be the case that the overtime has already been worked, and he is required to pay the employee. In such an instance, he may have some questions about why the overtime was authorized and may follow up with the supervising attorney to determine why it was necessary.

The Employer requires that its staff attorneys maintain time records showing the number of hours (or tenths thereof) worked on each case throughout each day. There was no evidence presented by either party as to whether the supervising attorneys are required to record their time in a similar fashion. The supervising attorney is required to review these time records and approve them. According to Bentley, this approval is required to represent that the time that has been entered on the form is appropriate for the task performed; that the supervising attorney is aware of the work the staff attorney is doing and the amount of time spent is appropriate to the nature of the case. Once the supervising attorney approves the time records, they are sent on for data entry. Bentley does not review time records. Holtzman testified that her review of the time records consists of whether a particular attorney is recording approximately seven hours per day in case-processing activities, since that is what they are getting paid for. She testified that due to the volume of cases processed in her department it would not be possible for her to conduct an in-depth review of the time spent on a particular matter against what is contained in the case file. The record establishes that these time records are not used to

compensate, reward, discipline or otherwise impact on the terms and conditions of employees.

Cases typically incur litigation expenses. Routine expenses, such as court filing fees, are authorized by way of a disbursement voucher form, which is signed by the supervising attorney and forwarded to Bentley for payment. There is also a petty cash voucher form, used to reimburse staff for out-of-pocket expenses, which is signed by the supervising attorney and then forwarded to Bentley for his review. According to Holtzman, Bentley will conduct his own review of the appropriateness of the expenses incurred, as evidenced by the fact that on various occasions he has called, e-mailed or sent notes to her with questions about them. Others types of disbursements, which involve larger, non-routine expenses, must be approved through a litigation expense authorization request. An attorney will make such a request when a matter requires the services of, for example, a process server, private investigator or a psychological assessment. This request is then approved by the supervising attorney and forwarded to Bentley for his review. Bentley considers the request in light of previous such expenses involving similar litigation. If, in his judgment, it is a reasonable request, he will approve it. Holtzman testified that Bentley reviews such requests carefully, and may question whether such a request is really necessary with an eye toward keeping expenses down. In all the above instances, the disbursements are not made without Bentley's approval either by signing off on the authorization request or by signing the check.

The supervisory attorneys attend monthly meetings conducted by Bentley and also attended by Deputy Director Snyder. Various agendas relating to the topics discussed in these meetings were entered into the record. It is apparent, however, that these agendas do not reflect whether or not the supervising attorneys had any input into decisions regarding matters discussed at these meetings. For example, Holtzman testified that the supervising attorneys were advised of changes in policy and procedure

over their objection, in particular relating to the institution of the current time recording and annual vacation accrual policies.[14] In addition, Holtzman testified, generally, that in prior years the input of the supervising attorneys would have been solicited regarding decisions of this magnitude, but over the course of the last two to three years, the supervising attorneys' role has become far more administrative in nature and they are no longer consulted regarding such labor-management concerns. The record reflects that, in 2000, the Employer has sent its supervising attorneys to a seminar to assist them in developing skills in the following areas: effective supervision, leadership, discipline and communication. There does not appear to have been any follow-up to this training.

Salary structure

Staff attorneys are compensated on five levels ranging from approximately $48,000 to $66,000, depending upon years of admission to the Bar and experience. Supervising attorneys currently earn approximately $104,000 per year. Both staff and supervisory attorneys receive the same fringe benefits and are subject to the same leave policies. Wage increases are granted in an across-the board fashion. All non-union staff, including supervising attorneys, received a 3% raise effective January 2003.

Positions of the Parties

The Employer argues that the supervising attorneys are statutory supervisors for a number of reasons. The Employer contends that the supervising attorneys use independent judgment in the interests of their employer in: assigning work and controlling work flow procedures; directing employees in their duties as to how cases are to be handled; the hiring, termination and discipline of employees and the assignment of overtime work and approval of other personnel actions such as employee transfers and

[14] The Employer maintains a vacation leave policy applicable to all employees. In particular, due to recent changes, employees must take vacation days as they accrue, as of the 15th of each month, and there is a limitation on the number of vacation days that can be carried over from one year to the next.

vacations. The Employer also contends that certain secondary criteria favor a finding of supervisory status, such as whether the individual is perceived as supervisory, the discrepancy in compensation between staff and supervising attorneys and the ratio of supervisory to non-supervisory employees. The Petitioner, to the contrary, argues that the Employer has failed to carry its burden of proof of showing the supervising attorneys to be statutory supervisors. In particular, the Petitioner argues that, at best, the supervising attorneys' authority with respect to the hire, transfer, discharge and discipline of employees is merely advisory, non-binding and subject to significant independent review; that the supervising attorneys perform administrative tasks which do not render them to be statutory supervisors; and that the supervising attorneys do not direct the work of the attorneys but rather act largely as a mentors and collaborators.

Discussion

The Applicable Legal Standards

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

It is well established that section 2(11) of the Act must be read in the disjunctive, and that an individual therefore need possess only one of the enumerated indicia for there to be a finding that such status exists. *Concourse Village, Inc*., 276 NLRB 12 (1985).

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *NLRB v*. *Kentucky River Community Care, Inc*., 532 U.S. 706 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic,* 273 NLRB 1677, 1688, 1689 (1985) It can not be

satisfied by "general, conclusory claims" or by proof of "paper authority" *Crittenton Hospital*, 328 NLRB 879 (1999) (written job description; state nurse practice laws which require nurses to "supervise" employees with lesser skills, but "do not purport to in any way track the NLRA's definition" of the term "supervise"); *Beverly Health and Rehabilitative Services*, 335 NLRB No. 54 (2001). Moreover, since "the issue of supervisory status is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate." *Brusco Tug and Barge Co.,* 247 F.3d 273, 276 (D.C. Cir. 2001) (citing *Kentucky River Community Care, Inc*., 193 F.3d 444, 453) (6th Cir. 1999).

In enacting the statutory definition of "supervisor" set forth in Section 2(11) of the Act, Congress "distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), quoted in Providence Hospital,* 320 NLRB 717, 725 (1996). This distinction is embodied in the statutory requirement that supervisors employ "independent judgment."

The Board and federal courts have observed that the Act "sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *See, Kentucky River*, supra, 523 U.S. at 713 (citing *NLRB v. Retirement Corp of America,* 511 U.S. 571, 573-574 (1994)). The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees," does not confer supervisory status. *Chicago Metallic*, 273 NLRB at 1689.

Application of the Relevant Standards to the Instant Case

Turning to the issue of whether the supervising attorneys here are statutory supervisors, the record fails to establish that they are authorized to suspend, lay off, recall, promote, discharge or reward employees, or to adjust their grievances, or to effectively recommend any of the aforementioned personnel actions. I further find that there is insufficient evidence to meet the Employer's burden of proof to demonstrate that the supervising attorneys are authorized to discipline or transfer employees or effectively recommend such actions. In particular, I note that there is no specific evidence that any supervisory attorney has recommended the discipline or termination of an employee. In fact, the evidence suggests that the memoranda which were prepared by the supervising attorneys detailing problems with employee performance were prepared at the Director's specific instruction. Furthermore, the record fails to establish that these memoranda resulted in any adverse personnel action taken towards the employees. It is well-settled that merely participating or assisting in an evaluation process or procedure does not confer supervisory status on the evaluator. *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999), *Harborside Healthcare, Inc*., 330 NLRB 1334, 1335 (2000). With respect to the issue of employee transfers, the general conclusory evidence provided by the Employer failed to establish either that the supervising attorneys determine or effectively recommend such actions. Rather, the evidence establishes that the system is an informal, and infrequently exercised, one. Moreover, the evidence additionally establishes that two employees were transferred into and remained in the Property department against the clearly expressed wishes of the supervisory attorney. Thus, I do not find the supervising attorneys to be statutory supervisors on this basis.

The areas that require further discussion, in my view, concern whether the supervising attorneys possess the requisite independent judgment and recommendatory

authority in the areas of hiring, the assignment of work and the responsible direction of employees to confer supervisory status.

Hiring of Employees

As the Petitioner notes, after a supervisory attorney recommends that a candidate for a staff attorney position be interviewed, the Director conducts his own review of that candidate's qualifications prior to an initial interview being scheduled. Moreover the interview conducted by the supervising attorney is, to some extent, determined by the Employer-generated checklist. Further, the evidence is clear that no candidate is hired without a second, extensive interview conducted by the Director, at times in conjunction with the Deputy Director. Thus it may be argued that while the supervising attorneys clearly play a major role in the hiring process, they do not have the authority to issue effective recommendations in regard to the hiring of successful candidates.[15]

The evidence also establishes, however, that a supervising attorney's recommendation not to proceed further with a candidate is virtually always controlling and therefore is an effective recommendation. In fact, there is no evidence of any occasion in which a negative recommendation was superceded by another level of review. Thus, the record establishes that supervising attorneys effectively recommend that employees not be hired. When viewed in conjunction with their extensive role in the hiring process in general, this recommendatory authority clearly militates toward a finding of supervisory status. See e.g. *Fred Meyer Alaska, Inc*., 334 NLRB No. 94, slip op. at 3 (2001).

[15] As noted above, the record is inconclusive as to whether the Human Resources department conducts a final level of review prior to hiring legal secretaries. And, there is no evidence regarding the procedures employed in the hiring of paralegals.

Assignment and Responsible Direction of Employees

As regards the issue of the supervising attorneys role in directing or assigning work to employees, as with every supervisory criteria, such assignment of work must be done with independent judgment before it is found to be supervisory under Section 2(11) of the Act. Thus, the Board has distinguished between routine direction or assignment of work and that which requires the use of independent judgment. See *Providence Hospital*, 320 NLRB 717, 727 (1996); and *Dynamic Science, Inc*., 334 NLRB No. 56 (2001). The Board has held that only supervisory personnel "vested with genuine management prerogatives should be considered supervisors, not straw bosses, lead men, setup men and other minor supervisory employees." *Ten Broeck Commons*, 320 NLRB 806, 809 (1996).

In *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 6 (2002), the Board cited, with approval, *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2d Cir. 2000), which held that "[i]n determining whether 'direction' in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable for the performance and work product of the employees he directs." The court also characterized responsible direction as "being answerable for the discharge of a duty or obligation." There, the evidence demonstrated that charge nurses were accountable for certified nursing assistants' provision of patient care. For example, a charge nurse was given a warning for "unacceptable performance" in connection with her failure to properly assess that a patient needed oxygen, and to ensure that her staff administered the oxygen to the patient.

In the instant matter, the Employer places great emphasis on the supervising attorney's intake and case assignment procedure. Other than the procedure which Holtzman described in the Matrimonial department, however, there is no specific evidence regarding how intake and case assignments are distributed or that they differ

significantly from the rotation procedure described by Holtzman. In this instance, I concur with the Petitioner that the supervising attorney's oversight of the intake system does not require the degree of independent judgment required for supervisory status. The intake slots are filled on a first-come-first-served basis by the screener. Moreover, it is clear from the record that the supervisory attorney has no knowledge of a case, or the issues it presents, prior to the intake appointment. I further note that the evidence shows that the supervisory attorneys do not possess the authority to close or limit intake without the approval of the Director. Therefore, it would appear that the assignment of work in this fashion is largely routine. *Franklin Hospital Medical Center*, supra. Similarly, I do not agree that the fact that the supervising attorneys' authorization is required on time sheets, litigation expense forms and other vouchers constitutes evidence of their supervisory status. The record establishes that the time sheets completed by employees do not impact on their employee status. Further, any significant disbursement of funds is independently reviewed and authorized by Bentley.

To the contrary, however, I do find that the supervising attorneys exercise responsible direction with respect to both the authorization of overtime for clerical employees as well as the approval of leave requests. In doing so, I recognize that there is no evidence that the supervising attorneys are authorized to direct employees to work overtime, and that the amounts of time involved are minimal. However, I also note that by the time the Director receives the authorization request, the overtime may well have been provided and the Employer is obliged to compensate the employee for the time worked; thus the supervising attorney's approval constitutes an effective recommendation that such overtime be approved. Further, the evidence establishes that a supervising attorney's approval is required prior to the authorization of any leave request. In this regard, I note that Holtzman testified that when a leave request is submitted, she will verify that there is adequate coverage in her department prior to

signing off on it. Thus, the evidence establishes that the supervising attorneys exercise independent judgment in this regard.

Moreover, I additionally find that the record establishes that the supervising attorneys are ultimately responsible for the timeliness and quality of literally hundreds of cases. The Petitioner argues that the supervising attorneys are not statutory supervisors because the Director, as counsel of record, is the person who is ultimately responsible for the office work product. This point, however, merely serves to reinforce the conclusion that it is the supervising attorneys who are ultimately answerable for the successful processing of the cases. Bentley testified that, other than the few matters he handles himself, he does not review cases. It is not conceivable that the Director, as counsel of record in over 4,000 pending situations, is solely responsible for the processing of these matters. As Holtzman testified, she reviews all cases on a regular basis for timeliness and quality and will make recommendations as to how to proceed. She expects that her recommendations will be followed, to the extent they remain the best thing to do. In addition, the record is clear that the supervising attorneys have the final say as to when a matter is appropriate for closure, and their determination is not subject to further review. Thus, in this regard the supervising attorneys are held "fully accountable" for the performance and work product of the staff attorneys. The Petitioner argues that the staff attorneys are highly qualified and experienced, and the supervising attorneys act largely as experienced mentors, valued professional resources and, ever increasingly, as administrators. However, the fact that the supervising attorneys are not frequently called upon to exercise their supervisory authority in this regard does not mean they do not possess it. *Fred Meyer Alaska, supra, slip op. at 4, n*. 8 (2001).

Secondary Indicia of Supervisory Status

It is well-settled that non-statutory indicia can be used as background evidence on the question of supervisory status. See e.g. *Training School of Vineland*, 332 NLRB

No. 152 (2000). Two such secondary indicia are the ratio of alleged supervisors to employees, *Ken Crest Services*, 335 NLRB No. 63 (2001) and differences in terms and conditions of employment. *North Shore Weeklies, Inc*., 317 NLRB 1128 (1995).

In the instant case, were the supervising attorneys found not to be statutory supervisors, there would be approximately 41 individuals in the petitioned-for unit, with the Director as the primary sole supervisor of all professional personnel. This ratio would appear to militate toward a finding of supervisory status. Further supporting a finding of supervisory status is the fact that the supervising attorneys' wages are significantly higher than those of even the most highly-paid staff attorney.

Based upon the foregoing, I conclude that the supervising attorneys are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will exclude them from the petitioned-for unit.

Although not specifically addressed by the parties, it appears from the record, and I find, that the attorneys in unit found appropriate are professional employees. Thus, they should be given an opportunity to vote on whether they wish to be included in the petitioned-for unit, or wish to be represented in a separate unit. In light of the foregoing, I therefore find that the following constitutes units that are appropriate for the purposes of collective bargaining:

UNIT A (Professional Unit)

Included: All full-time and regular part-time attorneys employed by the Employer.

Excluded: All non-professional employees set forth in Unit B below, and all other employees, including the Director, Deputy Director and guards and supervisors within the meaning of the Act.

UNIT B (Non-Professional Unit)

Included: All full-time and regular part-time paralegals employed by the Employer.

Excluded: All professional employees as set forth in Unit A above and all other employees, including the Director, Deputy Director and guards and supervisors within the meaning of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time [16] and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[17] Eligible to vote are those in the unit who were employed at the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an

[16] Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

[17] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20 of the Board's Rules, requires that the Employer notify the Regional Office at least five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[18]

Those employees who are in Unit A (Professional Unit) will be furnished a ballot containing the following questions:

> Do you wish to be included in the same unit as non-professional employees for the purposes of collective bargaining? ("Yes" or "No")
>
> Do you wish to be represented for the purposes of collective bargaining by the National Organization of Legal Services Workers (NOLSW), UAW, Local 2320, AFL-CIO?

Those employees who are in Unit B (Non-Professional Unit) will be furnished a ballot containing the following question:

> Do you wish to be represented for the purposes of collective bargaining by the National Organization of Legal Services Workers (NOLSW), UAW, Local 2320, AFL-CIO?

If a majority of employees in Unit A vote "Yes" to the first question, indicating a choice to be included in the overall unit with the non-professional employees, the professional employees will be so included. The ballots of the professional employees will then be counted with the ballots of the non-professional voting group to decide the

[18] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which my be used to communicate with them. *North Macon Health Care Facility,* 315 NLRB 359 (1994); *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make a list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **July 29, 2003.** No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

representative of the entire unit. If, however, a majority of the professional employees in Unit A do not vote for inclusion, these employees will not be included in the non-professional employee unit and their votes on the second question will be separately counted to decide whether they wish to be represented in a professional unit. [19]

Dated at New York, New York
July 22, 2003

(s) *Celeste J. Mattina*
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Code: 177-8520

177-8560

[19] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **August 5, 2003.**